APR 18 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 810

PATRICIA THURNAU, as Administratrix of the Estate of Philip George Thurnau, Deceased,
Petitioner,

against

ALCOA STEAMSHIP COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT ALCOA STEAMSHIP COMPANY, INC., IN OPPOSITION

J. WARD O'NEILL,
Counsel for Respondent,
Alcoa Steamship Company, Inc.,
80 Broad Street,
New York 1, N. Y.

DAVID P. H. WATSON,
on the Brief.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
The Statute Involved	2
Question Presented	2
Statement	2
Argument	5
The Decision Below Is Clearly Correct	7
There Is No Conflict of Decisions	9
There Is No Important Question of Federal Law Presented and the Petition Does Not Warrant Review by this Court	13
Conclusion	15

TABLE OF CASES CITED

Aguilar v. Standard Oil Co., 318 U. S. 724 (1943)	12
Brailas v. Shepard S. S. Co., 152 F. 2d 849 (2 C. A. 1945), cert. den. 327 U. S. 807	9
Buckeye Steamship Co. v. McDonough, 200 F. 2d 558 (6 C. A. 1952), cert. den. 345 U. S. 926	10
Hostolf-Nettles, Inc. and United Pacific Insurance Co. v. Pillsbury, 203 F. 2d 641 (9 C. A. 1953)	11
Kyriakos v. Goulandris, 151 F. 2d 132 (2 C. A. 1945)	13
McDonough v. Buckeye Steamship Co., 103 F. Supp. 473	10

PAGE

Nowery v. Smith, 69 F. Supp. 755, aff'd 161 F. 2d 732 (3 C. A. 1947) 11-12, 14

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U. S. 36 (1943) 6

Robinson, Admx. v. Northeastern Steamship Corporation, 228 F. 2d 679 (C. A. 1956) 8

Southern Pacific Co., 30 F. 2d 723 (S. D. N. Y. 1928), affirmed on the opinion below 30 F. 2d 725 (2 C. A. 1929) 9

STATUTES CITED

Act of June 5, 1920, Sec. 33, C. 250, 41 Stat. 988, 1007, Title 46, U. S. Code, Sec. 688 (Jones Act) 2

Defense Bases Act, 42 U. S. Code:

Section 1651 11

Section 1651 (a) 11

Title 33, U. S. Code, Secs. 901 et seq. (Longshoremen & Harbor Workers Compensation Act) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 810

PATRICIA THURNAU, as Administratrix of the Estate of Philip George Thurnau, Deceased,

Petitioner,

against

ALCOA STEAMSHIP COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT ALCOA STEAMSHIP COMPANY, INC., IN OPPOSITION

Opinions Below

There was no opinion in the District Court. Defendant's motion to dismiss the complaint made at the close of plaintiff's case was granted by the Trial Judge (J. A.* 108; S. M.** 147).

---

* J. A. refers to the joint appendix in the United States Court of Appeals for the Second Circuit.

** S. M. refers to the stenographer's minutes of the trial proceedings.

The opinion of the United States Court of Appeals is reported at 229 F. 2d 73 and is set forth as Appendix "A" on pages 27 and 28 of the petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

The Statute Involved

Plaintiff brought the action under § 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007; Title 46, United States Code, § 688, commonly known as the Jones Act.

Question Presented

The United States Court of Appeals for the Second Circuit in a *per curiam* opinion (Petition Appendix "A", p. 27) phrased the question in the following manner:

> "The sole question on this appeal—even if we assume, *arguendo*, that Thurnau was acting 'in the course of employment' within the meaning of the Jones Act while returning to his ship from shore leave—is whether a shipowner is under a duty to provide a safe means of transportation between the ship and any place of amusement crew members desire to visit while on shore leave in the vessel's home port."

Statement

The fact that there was a bus strike in Mobile was not known to the 1st Assistant Engineer and the 3rd Assistant Engineer of the vessel at the time they decided to hire a U-Drive-It car.

Wold, the driver of the car, testified that he knew nothing about the bus strike (S. M. 25-26; J. A. 29) and that the men paid no attention to such things (S. M. 37; J. A. 36):

> "Q. Now, I want you to think back and see if you can recall whether or not there was a bus strike on, around July 20th, in Mobile. A. Well, as I said before, buses didn't make much difference to us, and we never paid any attention to them. It might have been mentioned, but it would just have been water over the bridge."

It was common practice on the part of seamen to rent automobiles ashore (S. M. 28; J. A. 30; S. M. 113-114; J. A. 84-85) and for the crew to pile in and out of rented cars whether there was a bus strike on or not (S. M. 97; J. A. 74).

Even when the buses were operating the bus company schedules did not take into consideration the fact that a steamship might be tied up at the pier, and the schedule called for only four buses leaving the pier area after 5:00 P. M., and none after 11:00 P. M. (S. M. 76-78; J. A. 60-62).

Knowledge of the bus strike on the part of two local Mobile residents, one the manager of the Mobile City Bus Line (S. M. 75, 76; J. A. 60) and the other the vice-president of the Mobile U-Drive-It (S. M. 117; J. A. 87), cannot be imputed to the ship's personnel.

Any U-Drive-It cars rented by the members of the crew of the vessel were for their sole use and pleasure and were not used for ship's business, were not hired at the direction of the ship's officers, and were paid for by the crewmen themselves. No permission was required from the master or officers of the vessel in order to hire a car ashore (S. M. 27, 28; J. A. 29, 30; S. M. 58, 59; J. A. 48, 49). The contract for the renting of the car was made directly between the individual seaman and the U-Drive-It office, the latter looking only to the seaman for payment of the

rental or damages and not to respondent Alcoa Steamship Company, Inc. (S. M. 114-115; J. A. 85-86).

It was not the practice of the respondent in any port to furnish transportation to crew members to and from the ship to places of amusement ashore (S. M. 59; J. A. 49). No orders were ever issued either from the ship or from any shore office regarding affording transportation to other members of the crew in rented cars (S. M. 58, 59; J. A. 49).

Wold and a member of the crew both testified that if a member of the crew was given a lift in a U-Drive-It car rented by another crew member, then that was done as a friendly gesture and it was not a compulsory service or duty. If other personnel were ready to leave the vessel on shore leave at the time the renter of the U-Drive-It car was ready to leave, then they were given a lift (S. M. 27-28; J. A. 29-30; S. M. 95-96; J. A. 72-73).

The sequence of events leading up to the fatal automobile accident was as follows:

Philip George Thurnau served as third mate of the s/s Alcoa Pegasus in the employ of the defendant, Alcoa Steamship Company, Inc. On July 19, 1950, that vessel put into the port of Mobile, Alabama.

On the date of arrival, July 19, 1950, Kossman, 1st Assistant Engineer of the vessel, and Wold, 3rd Assistant Engineer, decided that Kossman would rent a U-Drive-It car for their personal use while ashore (S. M. 18, 19; J. A. 24, 25).

On the evening of the vessel's arrival, July 19th, Kossman and Wold in the U-Drive-It car went into town and later in the evening Wold remained in Mobile while Kossman went to the dog races in Pensacola in the rented car (S. M. 18, 19; J. A. 24). Wold returned to the vessel by taxi (S. M. 20, 21; J. A. 25).

On the afternoon of July 20, 1950, after the day's work aboard ship was finished at 5:00 P. M., Kossman and Wold left the ship in the U-Drive-It car (S. M. 21; J. A. 25, 26). After eating dinner ashore, Kossman told Wold he had decided to turn in early, but that Wold could use the car if he would return it to the U-Drive-It office before 12 midnight, which was closing time. Wold agreed and drove Kossman back to the vessel, after which he went to visit friends in Mobile, where he stayed until approximately midnight. He then drove the car directly to the U-Drive-It office, but found it closed (S. M. 21-22; J. A. 26). At that point Wold decided to keep the car and started making the rounds of various places in Mobile, first going to the Tapson House for a drink. There he met the deceased, Thurnau, at the bar and the two men had a few drinks together (S. M. 22; J. A. 26).

In an effort to find more lively places, Wold and Thurnau then went from one road house to another, finally ending up at a place called Temple Gardens at about 3:00 o'clock on the morning of July 21, 1950 (S. M. 22, 23; J. A. 26, 27). There they stayed, drinking and playing dice until approximately 5:00 A. M., just one hour before the scheduled sailing time of the vessel (S. M. 23; J. A. 27). They then got into the U-Drive-It car, with Wold driving, and in attempting to return to the ship started out in the wrong direction. Realizing that they were heading away from the vessel, Wold turned the car around and started down the highway in the other direction at high speed (S. M. 23; J. A. 27). Near Theodore, Alabama, on the outskirts of Mobile, the car struck a telephone pole (S. M. 23; J. A. 27; S. M. 80-83; J. A. 63-65). As a result of this accident Thurnau died.

Argument

A shipowner is not liable *per se* for all negligence of one employee towards another while those two may be

"in the course of employment" within the meaning of the Jones Act. An additional element is necessary.

In order to render the shipowner liable the fellow-servant must be acting in furtherance of the ship's business, or in the scope of employment. If the fellow-servant at the time of the negligent act is not performing a duty which the shipowner itself has a duty to perform, then the negligence of the fellow-servant cannot be imputed to the shipowner.

The affirmance by the United States Court of Appeals was based upon the fact that the shipowner respondent, Alcoa Steamship Company, Inc., was under no duty to provide a safe means of transportation to places of amusement visited by the deceased and Wold on the evening of the former's death.

The Court of Appeals did not believe that the bus strike in Mobile had any bearing upon the case. In the words of the *per curiam* opinion (Petition Appendix "A", page 27):

> "The absence, because of a bus strike, of bus transportation from the dock to the places of amusement frequented by these sailors does not make the shipowner responsible for the safety of the other readily available means of transportation, such as taxis or rented cars, that may happen to be chosen by the crew. * * *"

This Court has been well aware that in order to have negligence imputable to the shipowner under the Jones Act it is necessary that the negligent act be in some way connected with service to or operation of the vessel in navigation. Mr. Chief Justice Stone so stated in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36 (1943), when he wrote at page 42:

> "The right of recovery under the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the

> suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

The United States Court of Appeals in the instant matter did not state that the petitioner could not recover because decedent was injured ashore. The basis for the decision was that the negligence of Wold was not committed while he was performing a service for the vessel and had no connection with the operation of the s/s Alcoa Pegasus.

The Decision Below Is Clearly Correct

On the trial before the Honorable Thomas F. Murphy, U. S. D. J., and a jury, the defendant moved at the close of plaintiff's case to dismiss the complaint against the defendant and further moved for a directed verdict for the defendant upon the ground that the plaintiff had failed to prove any cause of action based upon negligence and had failed to otherwise establish a *prima facie* case against the defendant (S. M. 136; J. A. 100). This motion was granted by Judge Murphy (S. M. 147; J. A. 108).

On appeal to the United States Court of Appeals for the Second Circuit that Court, in a *per curiam* opinion, affirmed, holding:

> "• • • We think it clear that the shipowner is under no such duty [to provide a safe means of transportation between the ship and any place of amusement crew members desire to visit while on shore leave], and is therefore not liable under the Jones Act, 46 U. S. C. A. § 688, for the negligence, if any, of Wold and Kossman in renting and operating a car for their private pleasure while on shore leave. • • •"

The decision of the Court of Appeals was predicated upon the fact that any negligence on the part of Wold

in connection with the operation of the rented car was not to be imputed to his employer, the defendant-shipowner, since the shipowner had no obligation to provide such transportation in the first place.

Nor does the fact that Wold and the deceased were returning to the ship at the time of the automobile accident alter the picture in any manner, as is urged by the petitioner. Wold and the deceased were hurrying back to the ship at over 70 miles an hour, not because the shipowner had ordered them to do so, but because they had drastically overstayed their shore leave. They were supposed to be back aboard the ship one hour before the 6:00 A. M. sailing time, and at 5:00 A. M. they were still drinking at the Tapson House beyond the limits of the city of Mobile.

The fact that it may be to the benefit of the shipowner to have the crew aboard the ship before she sails does not impose responsibility upon the shipowner for all the foolish acts of the crew while trying to return aboard. Corporal Phillips of the Alabama Highway Patrol testified that Wold was drunk and that the odor of liquor was heavy on Thurnau (S. M. 82-83; J. A. 65).

In *Robinson, Admx.* v. *Northeastern Steamship Corporation*, 228 F. 2d 679 (2 C. A. 1956), the Court held that in order to render a shipowner liable under the Jones Act for a fellow seaman's negligence the seaman must be found to have violated a legal duty owed by the shipowner. Deceased was so intoxicated as to be unable to take care of himself. The Court of Appeals wrote as follows (228 F. 2d 681):

> "In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. *Without such authorization, Woods was not acting within the scope of his employment and his negligence, if any, in performing his voluntary under-*

taking could not be imputed to the defendant even if successful performance would further the interest of the shipowner. * * *" (Emphasis supplied.)

The fact is, of course, that the initial renting of the car by Kossman and its use by Wold were neither requested nor authorized by the defendant and were not in accordance with any custom recognized by the defendant.

In *Brailas* v. *Shepard S.S. Co.*, 152 F. 2d 849, 850 (2 C. A. 1945), cert. den. 327 U. S. 807, Judge Clark wrote as follows:

> "It is well established that a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master's business; the fact that the injury is done during the continuance of employment is not enough. *Davis* v. *Green*, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; *Bonsalem* v. *Byron S.S. Co.*, 2 Cir., 50 F. 2d 114; *Lykes Bros. S.S. Co.* v. *Grubaugh*, 5 Cir., 128 F. 2d 387, modified on rehearing 5 Cir., 130 F. 2d 25."

To the same effect is the ruling of District Judge Bondy in *In re Southern Pacific Co.*, 30 F. 2d 723 (S. D. N. Y., 1928), affirmed on the opinion below 30 F. 2d 725 (2 C. A. 1929). Judge Bondy wrote at 30 F. 2d 724:

> "It was not intended by that act [Jones Act] to impose liability on the master for the negligence of a servant while acting beyond the scope of his employment, though furthering the interests of his master. Were it otherwise, there would not be any limit to the liability of an employer for the unauthorized act of an employee undertaking to do anything the employee may consider beneficial to his employer."

There Is No Conflict of Decisions

Petitioner alleges on pages 13 through 17 of his petition that this decision of the United States Court of Appeals

for the Second Circuit is in conflict with earlier decisions of the United States Courts of Appeals in the Third, Sixth and Ninth Circuits.

Petitioner claims a conflict with *Buckeye Steamship Co.* v. *McDonough*, 200 F. 2d 558 (6 C. A. 1952), cert. den. 345 U. S. 926. That was an action involving liability of the shipowner under the Jones Act, but the case is readily distinguishable. There the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him through the dock area adjacent to the vessel. In that case, in assisting his shipmate the negligent seaman was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was acting within the scope of his employment.

The opinion of the District Court (*McDonough* v. *Buckeye Steamship Co.*, 103 F. Supp. 473 at 475) makes the distinction self-evident:

> "It is clear, from the testimony of Thomas Olson, the third mate of the Andrew Upson, that defendant's employees were authorized to assume control of seamen who were too intoxicated to be allowed on the dock alone. Olson related that the customary and established practice—at the various Great Lakes docks—was for the dock guard to detain these men and either turn them over to a sober shipmate if one appeared or else call the ship. The officer in charge of the ship then would personally go ashore or would send someone else to assist the seaman. This procedure was known to defendant and was the accepted and recognized practice invariably followed."

The *Buckeye Steamship* case involved negligence within the scope of employment, since the escorting seaman was acting pursuant to both orders and custom in escorting the intoxicated shipmate through the dock area to the vessel.

There is no testimony showing that Wold, the driver of the car, was acting under orders. The act of renting and driving the U-Drive-It car was admittedly a purely personal matter.

Petitioner alleges a conflict with the decision of the Ninth Circuit in *Hostolf-Nettles, Inc. and United Pacific Insurance Co.* v. *Pillsbury*, 203 F. 2d 641 (9 C. A. 1953). It escapes us how an analogy can be made with that case, since the Jones Act was in no way involved. That was a compensation case under the Defense Bases Act, 42 United States Code § 1651, which incorporated the compensation coverage provisions of the Longshoremen & Harbor Workers' Compensation Act, 33 U. S. Code § 901 et seq., provided only that the injury was incurred in employment on Base property.

In that action the injured employee was injured on property covered by the Defense Bases Act while returning from a place of amusement in an automobile driven by a fellow-servant. The only question was whether the injured man was "engaged in any employment" (42 U. S. Code § 1651(a)) at the time of the injury. There was nothing further needed. Negligence liability was not involved. There was no need to raise any question as to whether negligence was the cause of the injury or, assuming negligence of the driver, whether the negligent act was such as to make the driver's employer liable to the injured passenger.

The minimum requirements to establish a cause of action for negligence liability go far and away beyond the minimum proof required to entitle one to workmen's compensation.

Petitioner fails to recognize the distinction between negligence liability under the Jones Act and the seaman's right to recover maintenance and cure, for he claims that the decision of the Third Circuit in *Nowery* v. *Smith*, 69 F.

Supp. 755, affirmed 161 F. 2d 732 (3 C. A. 1947) is in conflict. The language of the Third Circuit's very short opinion makes it clear that the Jones Act and negligence liability were in no way involved, for they wrote as follows (161 F. 2d 732):

> "The question presented is whether the plaintiff, a seaman, was entitled to maintenance and cure by reason of an injury suffered without fault on his part in a fight in a barroom while on shore leave in a foreign port."

The Third Circuit affirmed on the District Court opinion of Judge Bard. Judge Bard had denied defendant's motion for a new trial on the issue of maintenance and cure and had granted a new trial on the issue of the Jones Act liability for negligence. The only appealable point was the final order of Judge Bard with respect to the denial of defendant's motion for a new trial on the issue of maintenance and cure.

The elements necessary to sustain a claim for maintenance and cure fall far short of those necessary to sustain an action for indemnity based upon negligence. In *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 736 (1943), this Court stressed that breach of duty is not an element in an action for maintenance and cure when it wrote as follows:

> "And his [the shipowner's] obligation to care for the seaman's injuries is, as has been shown, in no sense a function of his negligence or fault. • • • Consequently the fact that the shipowner might not be liable to the seaman in damages for the dock-owner's negligence, cf. *Todahl* v. *Sudden & Christenson*, 5 F. 2d 462 (C. C. A.), does not relieve him of his duty of maintenance and cure."

There Is No Important Question of Federal Law Presented and the Petition Does Not Warrant Review by this Court

The petitioner disagrees with the Trial Judge and the Court of Appeals when they held that Wold and the deceased were not performing a service on behalf of the shipowner when they drove back to the ship in the U-Drive-It automobile at over 70 miles an hour in an intoxicated condition.

The dismissal by the Trial Judge and the affirmance by the Court of Appeals for the Second Circuit were not predicated upon the fact that the injuries had been sustained ashore, some miles away from the ship.

There is no question of the geographical scope of the Jones Act involved. The affirmance of the dismissal was predicated upon the fact that as a matter of law the cause of the accident could not be imputed to the respondent shipowner.

The petitioner urges that there is a fundamental conflict with Jones Act cases involving assaults insofar as geographical limitations are concerned. Actually, the two cases cited by petitioner in support of this proposition both involved assaults where the negligent act was committed aboard the vessel.

In *Kyriakos* v. *Goulandris,* 151 F. 2d 132 (2 C. A. 1945), the plaintiff was assaulted ashore by a fellow crew member by the name of Bourtis. Counsel for petitioner seems to be under the impression that the act of negligence which formed the basis for the successful action under the Jones Act was the assault. That is not true at all. The act of negligence, as is shown by the opinion of the Court of Appeals for the Second Circuit, was the failure of the master of the vessel to discharge Bouritis when he was

on notice of the latter's longstanding record of repeated assaults and abuse aboard the ship. As stated by Judge Augustus N. Hand at 151 F. 2d 135:

> "If Bouritis had been discharged during the first three days of the ship's stay at Fernandina, the incident giving rise to the assault would never have occurred. * * * If the officers choose to continue to employ a man who is known or should be known by them to be a source of peril to those who sail with him, when measures which might reasonably be expected to prevent resulting injury are not or cannot be taken, a resulting injury to a member of the crew is one for which the person injured may recover under the Jones Act, 46 U. S. C. A. § 688."

The same is true for *Nowery* v. *Smith*, previously discussed in another connection, 69 F. Supp. 755, affirmed 161 F. 2d 732 (3 C. A. 1947). Here again the negligent act was not the act of the assailant ashore but was rather the negligence of the officers in having failed to discharge the assaulter at an earlier date, thereby making the act of negligence part and parcel of the ship's business and operations. The opinion of the District Court at 68 F. Supp. 758 shows us that the only theory of negligence liability which could be applied was the possible negligence of the operators of the ship in having failed to discharge the assailant in the light of knowledge of his wicked disposition and his propensity for violent and uncalled for assaults.

The courts are not applying two standards, one to assault cases and one to ordinary negligence cases, as the petition urges.

The decision of the Court of Appeals did not hinge upon the situs of the auto accident, but on the point that the respondent shipowner owed no legal duty to the deceased to provide shore transportation to or from any of the bars which he might choose to visit while on shore leave.

CONCLUSION

For the foregoing reasons it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. WARD O'NEILL,
Counsel for Respondent,
Alcoa Steamship Company, Inc.

DAVID P. H. WATSON,
on the Brief.